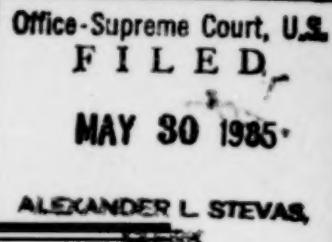


No. 84-1103



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

WILLIAM LLOYD HILL,

Petitioner,

v.

A. L. LOCKHART DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

Is the petitioner, a state prisoner, entitled to an evidentiary hearing in a United States District Court habeas corpus proceeding where the petitioner has alleged in his habeas petition that his state court negotiated guilty plea was involuntary and resulted from ineffective representation of counsel in that his attorney misadvised him as to his potential parole eligibility date and as a result of that advice the petitioner accepted the plea offer and entered the guilty plea?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CITATION TO THE OPINION AND JUDGMENT IN THE COURTS BELOW	1
STATEMENT OF JURISDICTIONAL GROUNDS	1
STATEMENT OF INVOLVED CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Allen v. Cranor</i> , 45 Wash.2d 25, 272 P.2d 153 (1954) .	14
<i>Arizona v. Holbert</i> , 114 Ariz. 244, 560 P.2d 428 (1977) .	13
<i>Blackledge v. Allison</i> , 431 U.S. 63 (1977)	16
<i>Christy v. United States</i> , 437 F.2d 54 at 55 (9th Cir. 1971) .	16
<i>Ex parte Young</i> , 644 S.W. 2d 3 (Tex. Cr. App. 1983) 10, 11	
<i>Hill v. Lockhart</i> , 731 F.2d 568 (8th Cir. 1984)	1, 4, 6, 7, 8, 14, 16, 17
<i>Hunter v. Fogg</i> , 616 F.2d 55 (2nd Cir. 1980)	15
<i>Johnston v. Zerbst</i> , 304 U.S. 458, 468 (1938)	6
<i>Lambert v. United States</i> , 392 F.Supp. 113 (N.D.Ga. 1975)	11
<i>Little v. Allsbrook</i> , 731 F.2d 238 (4th Cir. 1984)	9
<i>Murphy v. State</i> , 663 S.W.2d 604 (Tex. App. 1983) ...	12
<i>O'Tuel v. Osborne</i> , 706 F.2d 498, 500 (4th Cir. 1983)	7, 9, 10, 18
<i>Pennington v. Housewright</i> , 666 F.2d 329 (8th Cir. 1981) .	16
<i>People v. Blackburn</i> , 46 Ill. App.3d 213, 360 N.E.2d 1159 (1977)	12
<i>People v. Owsley</i> , 66 Ill. App.3d 234, 383 N.E.2d 271 (1978)	10
<i>People v. Tabucchi</i> , 64 Cal. App.3d 133, 134 Cal. Rptr. 245 (1976)	12
<i>People v. Wills</i> , 61 Ill.2d 105, 330 N.E.2d 505 (1975) .	12
<i>State v. Lamas</i> , 136 Ariz. 349, 666 P.2d 94 (1983)	16
<i>Strader v. Garrison</i> , 611 F.2d 61 (4th Cir. 1979)	4, 7, 8, 9, 10, 18
<i>Strickland v. Washington</i> , 104 S.Ct. 2052 (1984) . 4, 14, 15	
<i>United States v. Baylin</i> , 531 F.Supp. 741 (Del. 1982), rev. on other grounds, 696 F.2d 1030 (3rd Cir. 1982) ..	9
<i>United States v. Degand</i> , 614 F.2d 176 (8th Cir. 1980) .	15
<i>United States v. Ternullo</i> , 510 F.2d 844 (2nd Cir. 1975) .	8, 9
<i>United States v. Tweedy</i> , 419 F.2d 192, 193 (9th Cir. 1969) .	16
<i>Washington v. Harvey</i> , 5 Wash. App. 719, 491 P.2d 660 (1971)	13

Table of Authorities Continued

	Page
STATUTORY MATERIAL:	
Amendment VI of the United States Constitution	2
Amendment XIV of the United States Constitution, Section 1	2,
Ark. Stat. Ann. § 43-2829 (Cum. Supp. 1983)	17
Ark. Stat. Ann. § 43-2828(2)	2, 3, 5
Ark. Stat. Ann. § 43-2829(3)	2, 3, 5
Ark. Stat. Ann. § 432830.5 (Cum. Supp. 1983)	17
California Penal Code, Section 3049	12
21 U.S.C. § 1291	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2101(c)	1
28 U.S.C. § 2254	1
RULES:	
Federal Rules of Criminal Procedure at Rule 11(C)(1) .	11
Arkansas Rules of Criminal Procedure, Rule 24	11

CITATION TO THE OPINION AND JUDGMENT IN THE COURTS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at 731 F.2d 568 (8th Cir. 1984), and is reproduced in the Petition for Writ of Certiorari in the Appendix thereto at Appendix B. The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, was an unreported decision. The Memorandum and Order of the United States District Court is reproduced in the Petition for Writ of Certiorari in Appendix A.

STATEMENT OF JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Eighth Circuit was filed on April 9, 1984. (Petition for Writ of Certiorari, Appendix B.) A Petition for Rehearing en Banc was filed by the petitioner. Rehearing en Banc was granted. An order was entered by an equally divided court affirming the judgment of the District Court on September 20, 1984. (Petition for Writ of Certiorari, Appendix C.) The mandate of the Eighth Circuit was issued on October 15, 1984. A Writ of Certiorari was sought from this Court pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The Petition for Writ of Certiorari was filed in this Court on December 17, 1984. The ninety day filing requirement for the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 2101(c) was complied with. Certiorari was granted on March 18, 1985.

The jurisdictional basis of the United States District Court for the Eastern District of Arkansas rested upon 28 U.S.C. § 2254. The appellate jurisdiction of the United States Court of Appeals for the Eighth Circuit rested upon 21 U.S.C. § 1291.

STATEMENT OF INVOLVED CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS

Amendment VI of the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV of the United States Constitution, Section 1 states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark. Stat. Ann. § 43-2828(2) states:

Second offenders shall be inmates convicted of two or more felonies and who have been once incarcerated in some correctional institution in the United States, whether local, state, or federal, for a crime which was a felony under the laws of the jurisdiction in which the offender was incarcerated, prior to being sentenced to a correctional institution in this State for the offense or the offenses for which they are being classified.

Ark. Stat. Ann. § 43-2829(3) states:

Inmates classified as second offenders under this Act upon entering a correctional institution in this State

under sentence from a circuit court shall not be eligible for release on parole until a minimum of one-half (½) of their sentence shall have been served, with credit for good time allowances, or one-half (½) of the time to which sentence is commuted by executive clemency, with credit for good time allowances.

STATEMENT OF THE CASE

The petitioner William Lloyd Hill, a prisoner in the Arkansas Department of Correction, filed a "Petition for Writ of Habeas Corpus By Person In State Custody" with the United States District Court, Eastern District of Arkansas, Western Division, on June 30, 1981. (J.A. 3) That Petition, *inter alia*, attacked the voluntariness of a guilty plea entered in the Pulaski County, Arkansas, Circuit Court in 1979. (J.A. 8-9) The State of Arkansas had charged Mr. Hill with first degree murder and theft of property. The negotiated plea entered into by Mr. Hill resulted in a sentence of thirty-five years imprisonment for first degree murder with a ten year concurrent term on a theft of property conviction. (J.A. 66-70) In his Petition for Writ of Habeas Corpus, Mr. Hill alleged that his attorney informed him that he would only have six years to serve on his sentence if he "stayed out of trouble." (J.A. 9) He alleged that his attorney failed to inform him of the ramifications of Ark. Stat. Ann. § 43-2828(2) and § 43-2829(3), known as Act 93. (J.A. 9) These sections govern potential parole eligibility requiring a lengthier term for second offenders. As a result of a previous Florida conviction, Mr. Hill was a second offender under the act, and was not and is not eligible for parole consideration until having served one-half of his term less good time or approximately nine years. The United States District Court entered an order on March 2, 1983, denying the petitioner's request for an evidentiary hearing. (Petition for Writ of Certiorari Appendix A.) Mr. Hill

appealed to the United States Court of Appeals for the Eighth Circuit asserting that he was entitled to an evidentiary hearing in regard to the voluntariness of his plea and the competency of his court appointed attorney. The three judge panel of the Eighth Circuit by a two to one vote affirmed the decision of the United States District Court. *Hill v. Lockhart*, 731 F.2d 568 (8th cir. 1984). (Petition for Writ of Certiorari, Appendix B.) Mr. Hill petitioned for Rehearing en Banc. Rehearing en Banc was granted. By a five/five split vote the Eighth Circuit affirmed the decision of the United States District Court. (Petition for Writ of Certiorari Appendix C.) The Petition for Writ of Certiorari was timely filed in this Court on December 17, 1984. On March 18, 1985, the United States Supreme Court granted the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Petitioner William Hill argues that he is entitled to an evidentiary hearing in the United States District Court on his Petition for Writ of Habeas Corpus which alleged that his counsel misadvised him as to his potential parole eligibility date and, relying on that advice, Mr. Hill entered a plea of guilty. Mr. Hill contends that the positive misinformation supplied by his attorney, who overlooked an easily accessible and published state law, renders his plea involuntary. Mr. Hill also contends that this information supplied by his attorney and upon which he relied violated his Sixth Amendment right to effective assistance of counsel in that counsel's performance was deficient and adversely affected the outcome of the proceeding under *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Mr. Hill contends that his attorney's action violated the gross misconduct standard utilized by the United States Court of Appeals for the Fourth Circuit in *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979).

ARGUMENT

The petitioner William Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court in Little Rock, Arkansas, in 1978. In 1979 Mr. Hill entered negotiated pleas to both charges. He received a sentence of 35 years on the first degree murder charge and a concurrent sentence of ten years on the theft of property charge. (J.A. 69)

In effect at the time of Mr. Hill's guilty pleas was a state law governing potential parole eligibility requiring service of a longer term for second offenders before they could become eligible for parole. Ark. Stat. Ann. §§ 43-2828(2) and 2829(3), hereinafter referred to as Act 93. Mr. Hill is and was a second offender under this act and was not and is not eligible for parole as such until having served one-half of his sentence with credit for good time, or approximately nine years. Mr. Hill contended in his Petition for Writ of Habeas Corpus that his appointed attorney advised him prior to entering the guilty pleas that he would be parole eligible after serving one-third of his sentence less good time or approximately six years. (J.A. 9) Petitioner alleged in his Petition for Writ of Habeas Corpus that his plea was not voluntary as a result of the erroneous advice of counsel and that he did not receive effective representation as required by the Sixth Amendment of the United States Constitution. (J.A. 8-9)

The United States District Court for the Eastern District of Arkansas, Western Division, by Judge G. Thomas Eisele, found that Mr. Hill had failed to state an actionable claim under habeas corpus proceedings and dismissed the petition without an evidentiary hearing. (Petition for Writ of Certiorari, Appendix A.) The case was appealed to the United States Court of Appeals for the Eighth Circuit. In a split decision the three judge panel

affirmed. *Hill v. Lockhart*, 731 F.2d 568 (8th Cir. 1984). (Petition for Writ of Certiorari, Appendix B.) Following the granting of a Petition for Rehearing en Banc, the Eighth Circuit Court of Appeals split evenly thereby affirming the decision of the lower court. (Petition for Writ of Certiorari, Appendix C.)

Mr. Hill contends that his counsel's erroneous advice concerning his parole eligibility date was a critical factor in his decision to enter the guilty pleas. As pointed out in the United States District Court's Memorandum and Order (Petition for Writ of Certiorari, Appendix A-11), Mr. Hill will have to serve at least nine years of the thirty-five years before he can become eligible for parole. If he were parole eligible as he had anticipated, he would have to serve six years before meeting the parole board.

Respondent admits in the Brief in Opposition to the Petition for Writ of Certiorari that William Hill was misinformed by both his attorney and the Court as to his parole eligibility date. (Brief For Respondent in Opposition to Petition p. 3).

This Court has stated that a plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Johnston v. Zerbst*, 304 U.S. 458, 468 (1938). The critical importance of the earliest potential parole eligibility date when negotiating a guilty plea cannot be ignored. Attorneys' affidavits were provided to the United States District Court confirming the importance of an attorney's advice to his client concerning parole eligibility in negotiating pleas. These three affidavits were those of attorneys actively engaged in the practice of criminal defense work. (J.A. 48-50)

The United States Court of Appeals for the Eighth Circuit held that the information Mr. Hill allegedly re-

ceived from his attorney regarding his parole eligibility was not sufficient to render his guilty plea involuntary as a matter of law. *Hill, supra*, at 571. (Petition for Writ of Certiorari, Appendix B-7). Further, the United States Court of Appeals for the Eighth Circuit, relying on the reasoning of the United States District Court, found that it was undesirable that claimed misadvice on parole eligibility could potentially render pleas involuntary. *Hill, supra*, at 572. (Petition for Writ of Certiorari, Appendix B-7.) The petitioner contends that the Eighth Circuit holding is in error and that he is entitled to an evidentiary hearing on the issue of the voluntariness of his guilty plea and the effective assistance of counsel.

The United States Court of Appeals for the Fourth Circuit regards as incompetent an attorney who wrongfully informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates. *O'Tuel v. Osborne*, 706 F.2d 498, 500 (4th Cir. 1983); and *Strader v. Garrison*, 611 F.2d 61, 63 (4th Cir. 1979).

In *Strader, supra*, the defendant's lawyer assured his client that by pleading guilty and accepting a thirty year sentence to run concurrently with a prior sentence, the defendant would not extend his potential parole eligibility date. However, state law was different. His potential parole eligibility date was extended by several years as a result of the additional concurrent sentence. Strader's plea was determined to be involuntary.

In *O'Tuel, supra*, the attorney failed to discover that the applicable statute for parole eligibility had been amended and consequently informed his client that he would be eligible for parole after ten years when he was actually ineligible for parole until serving twenty years. O'Tuel's plea was rendered involuntary.

In *Strader, supra*, the attorney's actions are described as "gross misconduct." Following the *Strader* standard, the petitioner asserts that a difference in time served of three years before potential parole eligibility meets the *Strader* "gross misconduct" standard. The majority opinion and the dissenting opinion of the United States Court of Appeals for the Eighth Circuit in the instant case differed over the interpretation of the meaning of gross misconduct under *Strader, supra*. The majority opinion concluded that counsel's advice concerning Mr. Hill's parole eligibility even if not wholly-accurate did not constitute such an inadequate performance as to allow Mr. Hill to withdraw his plea. The majority opinion found that "gross misinformation" was not involved in this case. *Hill, supra*, at 572. (Petition for Writ of Certiorari, Appendix B-8.) However, the dissenting opinion pointed out that the majority below did not attempt to define gross misconduct or to distinguish the alleged misconduct of Hill's attorney. The dissent argued that the seriousness of the misconduct cannot be calculated by merely figuring the number of years in prison the attorney's mistake cost the defendant. The dissenting opinion points out that in both *Strader, supra*, and in the instant case, neither attorney consulted published law—the statutes applicable to parole. This failure to do minimal research justified labeling the attorney's conduct "gross misconduct." *Hill, supra*, dissent at 574. (Petition for Writ of Certiorari, Appendix B-12.) The petitioner argues that the approach taken by the Eighth Circuit dissenting opinion is the most logical manner to interpret the Fourth Circuit's test of gross misconduct and should be applied in the instant case.

In *United States v. Ternullo*, 510 F.2d 844 (2nd Cir. 1975), the United States Court of Appeals for the Second Circuit found that a defendant was entitled to an

evidentiary hearing upon an allegation that his plea was involuntary as a result of the erroneous advice of his attorney as to potential parole eligibility dates. There the defendant had pled guilty to second degree robbery and had received a prison term of five to fifteen years. His attorney advised that it was his understanding that the sentence was from five to fifteen years and that his client would be released on one-third of the minimum sentence with good behavior. The Court stated that the attorney's advice was clearly a misrepresentation of then existing New York law. Applicable New York law passed three years prior to the entry of the plea stated that a defendant sentenced to an indeterminate term would not be eligible for parole until he had served the minimum period fixed by the Court. The Second Circuit found that the prisoner was entitled to an evidentiary hearing to determine whether his plea was rendered without understanding his sentencing possibilities. The Court pointed out that counsel was not being second guessed about a prediction which was proven inaccurate but rather about a statement of an easily accessible fact. The case was remanded.

Easily distinguished from the instant case, *Strader, supra*, *O'Tuel, supra*, and *Ternullo, supra*, is *United States v. Baylin*, 531 F.Supp. 741 (Del. 1982), rev. on other grounds, 696 F.2d 1030 (3rd Cir. 1982), where the Delaware District Court held that any unilateral expectation on a pleading defendant's part as to his likely date of parole, not induced by an "affirmative" misrepresentation (emphasis added), could not provide the basis for challenging a guilty plea. The holding does suggest in dictum that an attorney's advice concerning a guilty plea where inaccurate may state grounds for post conviction relief.

Also distinguishable is *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984), relied upon by Respondent. In that case

the defendant did not know what sentence to expect to receive at the time of the entry of his guilty plea. Little's attorney never told him the exact sentence he would receive. Neither the petitioner, the prosecutor, or the defense counsel knew what exact sentence Little would receive at the time of his plea. In *Strader, supra, O'Tuel, supra*, and in the instant case, the defendants knew the sentence to be received, and the controlling parole eligibility law was accessible since it was published and an approximate parole eligibility date could be determined.

Certain state courts have taken positions in conflict with the United States Court of Appeals for the Eighth Circuit in this case. In *People v. Owsley*, 66 Ill. App.3d 234, 383 N.E.2d 271 (1978), the Appellate Court of Illinois reviewed the order of a lower court judge summarily dismissing without a hearing a petition for post-conviction relief alleging that the defendant's trial attorney during plea negotiations misrepresented among other things the time the defendant would serve before becoming parole eligible. The appellate court held that it was error to summarily dismiss the petition. The Court held that the trial court should determine whether the allegations in the petition reviewed against the record of the guilty plea hearing were so palpably incredible, patently frivolous, or false as to warrant summary dismissal.

In *Ex parte Young*, 644 S.W.2d 3 (Tex. Cr. App. 1983), the lower court found that the attorney incorrectly informed his client that he would be eligible for parole at three years of two concurrent fifteen year sentences for two aggravated robberies when the client would have been eligible for parole only after five years. (That was an error of two years, compared to three years in the instant case.) In *Ex parte Young, supra*, a plea bargain agreement with the prosecutor had been reached and in ex-

change for pleas of guilty the prosecutor agreed to recommend to the trial court that the defendant be sentenced to fifteen years confinement with two sentences running concurrently. The trial court accepted the plea bargain. Petitioner contended that his counsel had misadvised him in that his initial eligibility for parole was two years later than counsel's advised time period. The lower court had made the fact finding that the petitioner's attorney had misadvised petitioner.

The Texas Court of Criminal Appeals held that:

Although parole eligibility is a collateral consequence of the entry of a plea of guilty and a defendant is not entitled to be informed of parole eligibility by the trial court (citations omitted), if the defendant is grossly misinformed about his parole eligibility date by his attorney, and the defendant relies upon that misinformation to the extent that it induces him to a guilty or a *nolo contendere* plea, his plea may be rendered involuntary. *Ex parte Young, supra*, at 4, 5.

Gross misinformation may be distinguished from mere erroneous predictions. In *Lambert v. United States*, 392 F. Supp. 113 (N.D.Ga. 1975), the court distinguished counsel's bad judgment call in that indeterminate sentence case from those situations where the correct information was readily obtainable by counsel.

Mr. Hill does not contend nor does he need to reach the constitutional issue of whether the trial court should have inquired as to his understanding of his potential parole eligibility. Rule 24 of the Arkansas Rules of Criminal Procedure does not require such an inquiry nor do the Federal Rules of Criminal Procedure at Rule 11(C)(1). It should be noted that not all courts agree with that approach. Some relevant court cases will be reviewed here to stress the importance state appellate courts have

placed on the relationship between the defendant's understanding of his potential parole eligibility date and the voluntariness of his plea. A California appellate court has held that the failure by the court to advise a defendant of a statute requiring a minimum term for parole eligibility renders a plea involuntary. *People v. Tabucchi*, 64 Cal. App.3d 133, 134 Cal. Rptr. 245 (1976). In *Tabucchi*, *supra*, the Defendant was sentenced to a minimum term of five years, and mistakenly believed that he would be parole eligible after serving one-third of the five year term. To his surprise he was not eligible for parole until he had served three years of the minimum term. The appellate court held:

Recognizing the critical importance to a defendant of the right to parole and recognizing the wide spread knowledge of persons charged with crime concerning the "one-third minimum time" parole policy of the adult authority in usual cases, we believe that notice to a defendant of any statutorily required minimum term for parole eligibility contrary to and of greater duration than the usual adult authority policy based on Penal Code, Section 3049, is constitutionally required as prerequisite to entry of a guilty plea . . . such a minimum term for parole eligibility must be deemed a direct rather than a collateral consequence of the guilty plea.

Tabucchi, supra, 64 Cal. App.3d at 143, 134 Cal. Rptr. at 251.

The Illinois Supreme Court has held that the trial court's failure to admonish a defendant concerning a mandatory period of parole when accepting his guilty plea is a factor to be considered in determining the voluntariness of the plea. *People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505 (1975), and, see also, *People v. Blackburn*, 46 Ill. App.3d 213, 360 N.E.2d 1159 (1977). *Accord, Murphy v. State*, 663 S.W.2d 604 (Tex. App. 1983), where it was held

that failure to admonish a pleading defendant of probation ineligibility was error.

If the trial court does advise the defendant concerning potential parole eligibility and advises him incorrectly, that may be grounds for setting aside the plea. Several state court appellate decisions address the effect of a trial court judge's misadvice to the defendant concerning his potential parole eligibility at time of sentencing. In *Arizona v. Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977), the defendant pled guilty to second degree armed burglary and armed robbery and was sentenced to concurrent terms of not less than forty nor more than sixty years on both counts. The defendant's use of a gun during the commission of the offense rendered him ineligible for parole until serving the minimum term. None of the attorneys present nor the sentencing judge properly explained the consequences of the statute controlling parole eligibility to the defendant. The Court, while inquiring about the defendant's understanding of the plea, stated that the defendant was not eligible for parole until the expiration of five calendar years, a gross misstatement of his parole eligibility. Neither the defense attorney nor the prosecutor corrected the judge. The Arizona court found that the plea was, therefore, not knowingly and intelligently made and that the defendant did not understand the true consequences of his plea. In *Washington v. Harvey*, 5 Wash. App. 719, 491 P.2d 660 (1971), the lower court had erroneously advised the defendant that the Board of Prison Terms and Paroles could determine what minimum term might be set where the consecutive terms imposed by the court created a mandatory minimum term. The court's erroneous advice rendered the plea defective.

A prosecuting attorney's erroneous advice to a defendant concerning potential parole eligibility has been held

to render a plea involuntary. In *Allen v. Cranor*, 45 Wash.2d 25, 272 P.2d 153 (1954), a prosecuting attorney told the defendant that the parole board could set a minimum term of imprisonment when the law had been amended to deprive the board of that authority. Based on the erroneous advice given by the prosecutor, the guilty plea was set aside and habeas relief was granted.

Mr. Hill also raised in his petition the contention that he was denied effective assistance of counsel as guaranteed by the Sixth Amendment by his appointed attorney's failure to advise him correctly as to his potential parole eligibility date. The test for effective assistance of counsel is found in *Strickland v. Washington*, 104 S.Ct. 2052 (1984). In the instant case the United States Court of Appeals for the Eighth Circuit found that "counsel's advice concerning Hill's parole eligibility, even if not wholly accurate, does not amount to constitutionally inadequate performance and is not a dereliction of duty sufficient, by itself, to allow Hill to withdraw his guilty plea." *Hill, supra*, at 572. (Petition for Writ of Certiorari, Appendix B.)

While the United States Court of Appeals for the Eighth Circuit is correct in asserting that counsel is not required to perform perfectly, *Strickland, supra*, at 2065, indicates that "[C]ounsel . . . has a duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process." The attorneys' affidavits filed with the United States District Court confirming the importance of properly advising clients of their parole eligibility dates should create a factual issue as to whether the adversarial nature of Mr. Hill's trial court appearance was reduced because of gross misinformation provided by his attorney. That misinformation could have been cured by the mere reading of a statute.

After showing that counsel's performance is deficient, *Strickland, supra*, at 2064, requires a review of whether counsel's errors were so serious as to deprive the defendant of a fair trial. [i.e. "(the errors of counsel) actually had an adverse effect on the defense." *Strickland, supra*, at 2067.] The adverse effect in Mr. Hill's case is obvious in that counsel's alleged errors resulted in a plea and waiver of a trial. At least a factual issue should exist as to whether or not Mr. Hill's appointed attorney acted within the range of competence demanded of attorneys in criminal cases, and to whether any failure to act competently prejudiced the outcome of Mr. Hill's proceeding. The reasonableness of Mr. Hill's attorney's conduct and the likelihood of prejudice is best established at a hearing.

Petitioner's argument herein concerning the effect of erroneous advice directed towards parole eligibility is *contra* to the position taken by the Second Circuit in *Hunter v. Fogg*, 616 F.2d 55 (2nd Cir. 1980), discussed in the Respondent's Brief in Opposition to Petition at p. 5. It should be pointed out, however, that in *Hunter v. Fogg, supra*, the petitioner stated that the attorney advised him as to what he "might anticipate" as to parole eligibility, but did not promise him a definite eligibility date as is the case herein. The State and the majority opinion of the Eighth Circuit also relied on *United States v. Degand*, 614 F.2d 176 (8th Cir. 1980). That case does not deal with potential parole eligibility advice but rather misadvice by counsel concerning concurrent or consecutive sentencing. At sentencing, Degand's attorney expressed his "hope that your action, your Honor, would make it possible that we might combine timewise the imprisonment in Illinois and the federal punishment at the hands of the federal government in this case." *Degand, supra*, at 178. As pointed out by the dissenting opinion in the Eighth Circuit any advice that Degand's attorney gave him was

based on hope of leniency rather than a misreading of the law as is the case herein. *Hill, supra*, dissent at 574. (Petition for Writ of Habeas Corpus, Appendix B-11.) As pointed out by the dissent, nothing said at Hill's plea hearing would have alerted him to his attorney's legal error and the Court did not address parole eligibility until after accepting the plea. Even then, the Court reinforced the attorney's error by stating Hill would have to serve "at least one-third of his sentence." *Hill, supra*, at 178. (Petition for Writ of Certiorari, Appendix B-11.)

Respondent also argues that no evidentiary hearing is needed since the sentencing hearing reflected in the Pulaski County Circuit Court record (J.A. 66) indicates petitioner was aware of his rights at the proceeding. The State argues in effect that the transcript below creates an irrebuttable presumption of voluntariness on the issue raised herein. The petitioner is not precluded from challenging the voluntariness of his plea because of the transcript below. The State submits that a high burden is placed on the petitioner to demonstrate extraordinary circumstances to gain a hearing in light of an existing record which would seem to indicate voluntariness. *Blackledge v. Allison*, 431 U.S. 63 (1977), and *Pennington v. Housewright*, 666 F.2d 329 (8th Cir. 1981). The fact that upon entering a plea the defendant assures a court that no one has promised him anything is not conclusive. For example, the Ninth Circuit has noted in *United States v. Tweedy*, 419 F.2d 192, 193 (9th Cir. 1969), that the defendant might have felt that it was all part of the game and that honest answers would destroy the deal. See also, *Christy v. United States*, 437 F.2d 54 at 55 (9th Cir. 1971) and *State v. Lamas*, 136 Ariz. 349, 666 P.2d 94 (1983).

A statement in the Eighth Circuit's decision in this case

should be addressed herein. In the majority opinion the Court stated:

Further reasons articulated by the district court make it undesirable that claimed misadvice on parole eligibility render the plea involuntary. The petitioner's behavior and legislative and administrative changes in parole eligibility rules may affect this date. Every plea bargaining arrangement thus would be subject to reopening any time a defendant did not become eligible for parole at the time estimated. We do not believe that the Constitution requires this conclusion. (Petition for Writ of Certiorari, Appendix B-7.) *Hill, supra*, at 572.

It is true that the petitioner's behavior as it relates to the accrual of good time may affect his potential parole eligibility date. However, that is a matter solely within the petitioner's control and has nothing to do with the advice received from counsel. As to legislative and administrative changes, it is the policy of the Arkansas Department of Corrections and the Arkansas Legislature to continue the parole eligibility law in effect at the time of the defendant's plea throughout his incarceration. See, Ark. Stat. Ann. § 43-2829 (Cum. Supp. 1983) and Ark. Stat. Ann. § 43-2830.5 (Cum. Supp. 1983). Specifically Ark. Stat. Ann. § 43-2830.5 (Cum. Supp. 1983) states that nothing in the Act addressing the parole eligibility of persons committing certain felonies after April 1, 1983, is construed to repeal the parole eligibility laws in effect on the date of criminal offenses committed prior to that time. Petitioner submits that there are no legislative or administrative changes that have affected his parole eligibility date. If there are alleged administrative changes that may have affected that date, then that matter is best addressed at the evidentiary hearing requested by petitioner.

Finally, petitioner contends that a reversal and remand for an evidentiary hearing in this case would not set a precedent to be abused by those incarcerated from guilty pleas or establish a basis for reopening every plea bargaining arrangement. (Petition for Writ of Certiorari, Appendix A-12.) The remand for a hearing in this case will establish precedent only for allowing a hearing on an allegation of affirmative misadvice concerning parole eligibility resulting from the attorney's failure to read published statutes. The precedent here will be similar to that in *Strader*, *supra*. If the District Courts of the Fourth Circuit had been inundated with habeas petitions following *Strader*, *supra*, surely that result would have been reflected in the *O'Tuel*, *supra*, opinion four years later.

CONCLUSION

For the reasons stated above, the petitioner requests that the United States Supreme Court reverse the holding of the United States Court of Appeals for the Eighth Circuit and remand this matter to the United States District Court for the Eastern District of Arkansas, Western Division, for an evidentiary hearing in this matter.

Respectfully submitted,

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